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No. 591-70

In the Supreme Court of the United States

71-823

October Term 1971

UNITED STATES OF AMERICA,
Respondent,

v.

GLENN JORGENSON,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Petitioner Glenn Jorgenson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit rendered in the above-entitled case November 19, 1971.

CITATIONS TO OPINIONS BELOW

The decision of the United States District Court is unreported. The opinion of the Circuit Court of Ap-

peals, as yet unreported, is printed in Appendix A hereto, *infra*, pp. 10.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on the 19th day of November, 1971, p. 10 *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court denied the appellant his right of confrontation of witnesses as guaranteed by the Sixth Amendment of the United States Constitution.

2. Whether petitioner's absence at certain proceedings was grounds for mistrial.

3. Whether petitioner and offenses were sufficiently connected to make joinder proper under Federal Rules Criminal Procedure Rule 8 or whether petitioner's case should have been severed under Federal Rule Criminal Procedure Rule 14.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him . . . and to have the Assistance of Counsel for his defense."

STATEMENT OF FACTS

On December 18, 1968, an indictment was filed in the United States District Court for the District of Utah, Northern Division, charging the appellant Glenn Jorgenson and seven others with making, causing to be made, and conspiring to make false statements on official applications for Federal Housing Administration Title I Home Improvement Loans, in violation of 18 U.S.C. § 371 and 18 U.S.C. § 1010. After a joint trial in which the Government presented 81 witnesses and 613 exhibits, the appellant was found guilty by a jury.

The court below affirmed the verdict of the trial court finding that there had been no violation of the Sixth Amendment as to the petitioner's constitutional rights nor had the trial judge erred in refusing to sever the petitioner from the other defendants. The Circuit Court also found no error in refusing to grant a mistrial based on the absence of petitioner at certain proceedings.

REASONS FOR GRANTING THE WRIT

In the instant case, the trial court ruled that no defense counsel could ask a question on cross-examination that had previously been covered by codefendants' counsel's cros-examination. Petitioner contends that such a ruling directly conflicts with his rights and the principles guaranteed by the Sixth Amendment to the Constitution of the United States and the principles enunciated by this Court.

This Court has held many times that the right to cross-examination is included in the right of an accused

in a criminal case to be confronted by all witnesses against him. *Pointer v. Texas,* 380 U.S. 400 (1965). In *Brookhart v. Janis,* 384 U.S. 1, 3 (1966), this Court stated that "[a] denial of cros-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." See also *United States v. Dickens,* 417 F.2d 958 (1969), where the Court held cross-examination was essential to a fair trial; *Grant v. United States,* citing cases 368 F.2d 658, full cross-examination is a right; *Cokley v. Colorado,* 310 F. Supp. 1403 (1969), thorough cross-examination is the essence of a fair trial.

Petitioner did not waive any right to limit cross-examination, inasmuch as petitioner specifically took exception to the limitation of any cross-examination.

Petitioner contends that the restriction on cross-examination in this case constituted and abuse of discretion and a denial of confrontation, as was stated in *Harries v. United States,* 350 F.2d 231 (9th Cir. 1965).

> " . . . Even where it cannot be said that cross examination was actually denied, the circumstances may be such as to indicate that the particular restriction in question constituted an abuse of discretion."

Such a refusal to allow further cross-examination was prejudicial to the petitioner in that it hampered the petitioner's approach to his defense, limited attempts at impeachment of witnesses, and greatly restricted defense counsel to confront witnesses and achieve his desired goals in cross-examination.

2. Petitioner contends that under Rule 43 of Federal Rules of Criminal Procedure he did not voluntarily waive his right to be present at all stages of the proceedings and his absence was grounds for a mistrial. Rule 43 states:

> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. . . . In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

During the trial, petitioner was not present during important stages of the trial, especially during the hearing where it was brought to the attention of counsel and judge that several government witnesses were not on the list presented to counsel and the jury. A motion for mistrial was made because of the dilemma presented since any polling of the jury at this late date as to whether or not they knew witnesses excluded from the list would serve to emphasize the testimony of these witnesses. This would be especially prejudicial since one of the witnesses, Millard, was a prior codefendant who had "turned state's evidence." Also discussed was the fact that witness Millard's wife had been taking notes during the trial of the testimony of other witnesses. How to remedy the chance of prejudice resulting from this indiscretion was

the focus of this discussion. Further, counsel for the petitioner moved to have cumulative evidence suppressed, and after some argument, the court made a preliminary ruling on this issue. Finally, a motion was made at this conference that the defendants had been prejudiced by a lack of challenges since some of the prospective jurors who were peremptorily challenged may have been successfully challenged for cause on the grounds that they knew one or more of the witnesses left off the list. This conference is evidenced in the transcript from page 774 to 805.

The petitioner was absent during the testimony of juror Maxfield and the subsequent conference about his testimony regarding his acquaintance with one of the witnesses. (Tr. 478-81.)

There is also no evidence that petitioner was present during the times counsel argued that the court's ruling preventing a cross-examiner to ask a question that had been asked previously by a codefendant's counsel constituted error as a denial of confrontation. This point was argued more than once, as the single reference in the transcript indicates. (Tr. 689-91.)

While the transcript specifically notes the presence of counsel at the proceedings recorded on page 880, there is no indication that the petitioner was present, and the likely inference is that he was not. (Tr. 879.)

On the eighth day of trial when the problem of the witness Millard's wife taking notes was again discussed and arguments renewed, there is no indication that the petitioner was present. (Tr. 884.) Since the recorder expressly noted the presence of the defendants

in open court on the very next page (Tr. 885), the likely inference is that the petitioner was absent from the chambers discussion.

When it finally occurred to counsel that during the first five or six days of trial that the defendants had not been present during several important stages, a motion for mistrial was made. At this time the trial judge obviously felt the claim totally without merit because he felt waiver of presence had been effectuated, and in open court he chastised counsel. (Tr. 1311-17.) Later, however, the judge took time to apologize for those comments since during the interim he had found support for the petitioner's claim and he now believed the motion had some merit, although it was still denied. (Tr. 1421-24.).

In *United States v. Neal*, 320 F.2d 533 (3d Cir. 1963), the primary issue on appeal seemed to be whether or not the appellant's counsel was present when the judge received and answered a note from the jury during deliberations. However, the circuit court, citing Rule 43, said this factual issue was totally irrelevant because it was clear that the defendant was absent, and this necessitated reversal even if his counsel were present. See also *United States v. Noble*, 155 F.2d 315, 318 (3d Cir. 1946).

Finally, in *Evans v. United States*, 284 F.2d 393 (6th Cir. 1960), the court reversed the defendant's conviction, citing Rule 43, because the trial judge gave additional instruction to the jury in response to its request in the absence of the defendant even though the instructions were given in open court and in the pres-

ence of the defendant's counsel and the instructions were later repeated in the defendant's presence.

Given the strictness of the waiver standard under Rule 43 and the fact that courts from several different jurisdictions have held that even express attempts to waive accused's presence by their counsel are ineffectual, the facts of this care hardly present a question of waiver. Petitioner was never made aware of the implications of any nonpresence. To be a voluntary waiver of the right to be present, an absence must be an intentional, calculated act, and not merely inadvertent. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

3. Petitioner contends that offenses were not sufficiently connected and should have been severed under Rule 14, Federal Rules of Criminal Procedure.

In the instant case there were originally eight defendants and fifteen different charges. This was reduced at trial to seven defendants and thirteen different charges. At the trial 81 witnesses testified for the Government and 613 exhibits were admitted into evidence. Petitioner was the only defendant not directly associated with the loan brokerage firm during the crucial period.

The prejudicial effect of the "wave after wave" of borrower/witnesses very likely caused confusion of the jurors. With such an unworkable number of witnesses, the jurors were unlikely to recall which ones, if any, directly incriminated the petitioner. Rather, it is more likely that a juror would only recall that some of the witnesses had mentioned the petitioner's name, and therefore conclude that it must have been in connection with fraudulently filling out some of the scores of loan

applications evidenced to them. In other words, the repetitious nature of the testimony coupled with its volume tended to obscure the actual testimony and demeanor of each individual witness to the point of making recollection of any particular testimony impossible. This would make the transference to the petitioner of testimony given against other defendants highly probable. While actions of others in furtherance of an existing conspiracy are chargeable to their co-conspirators, there is nothing to insure that evidence on the conspiracy charge wasn't also transferred to the petitioner. This is especially likely since the trial court's preliminary instructions contained no reference to the unique problems of a multi-defendant trial. The large number of witnesses and exhibits presented against the defendants and implicating them in varying degrees cannot be said to have not prejudiced the jury because of its highly cumulative and unnecessarily repetitious effect and because of the confusion inherent in such a parade of testimony.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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December 16, 1971

APPENDIX A

In the United States Court of Appeals For the Tenth Circuit

November 1971, Term

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GLENN JORGENSON,
Defendant-Appellant.
No. 591-70

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, NORTHERN DIVISION

(District Court No. NCR-56-68)

Phil L. Hansen, Salt Lake City, Utah, for Appellant.
James F. Housley, Assistant United States Attorney (C. Nelson Day, United States Attorney, on the brief), Salt Lake City, Utah, for Appellee.
Before LEWIS, HILL and DOYLE, United States Circuit Judges.
HILL, Circuit Judge.

Jorgenson, with five individual co-defendants and two corporate co-defendants, was indicted jointly of conspiracy to defraud an agency of the United States, *viz*, the Federal Housing Administration, in violation of 18 U.S.C. § 371. In addition, 14 separate counts charged

each of the eight co-defendants with preparing fraudulent F.H.A. Title I Home Improvement Loans with knowledge of false statements made on the loan application in violation of 18 U.S.C. § 1010. Two counts were later dismissed, and all charges were dismissed as to Millard, who later testified in behalf of the government. It is the remaining twelve separate counts which form the basis for the conspiracy charge. Jorgenson was convicted by a jury and sentenced to pay a fine of $1,000 on each of Counts One (conspiracy count), Two and Three (substantive counts), the fines to be concurrent for a total of $1,000. The sentence was suspended on the remaining ten counts, and Jorgenson was placed on two years' probation on those counts.

Appellant raises four arguments urging this Court's reversal of his conviction. The first argument is that the ruling of the trial court restricting cross-examination by defense counsel constituted an abuse of discretion and denied Jorgenson his constitutional right to confront witnesses against him. His second claim of error by the trial court was the failure to sever him from the trial of the other co-defendants. He contends there was either improper joinder under F.R.Crim.P. Rule 8 or, in the event joinder under Rule 8 was proper, he was prejudiced by being made a co-defendant, therefore should have been severed under F.R.Crim.P. Rule 14. His third claim of error questions whether his absence at certain times during the proceedings was grounds for mistrial. Appellant's fourth point questions the sufficiency of the government's evidence to justify the trial court's denial of his motion for judgment of acquittal under F.R. Crim.P. Rule 29(a).

The conspiracy allegedly was begun when the individual co-conspirators, employees of Manning Investment Company (Manning), contacted automobile dealers and explained a financing program available through Manning, the corporate co-defendant. The plan involved prospective automobile purchasers who were also home owners. When this type of customer was found, he was informed of more favorable financing available on the basis of his home ownership. After the purchaser had selected the vehicle he desired, a credit application was filled out on the automobile dealer's credit application form. The purchaser was then permitted to take the automobile and was told he would be contacted later for an appointment to complete the credit arrangements. The automobile dealer subsequently relayed the credit information to Manning which, in turn, relayed the information to an employee in the Home Improvement Loan Department of Zions Savings and Loan Association (Zions), usually the appellant Jorgenson, who was manager of that department. He would then complete a Zions work sheet based on this credit information, with the indication that the loan proceeds were to be used in making authorized home improvements on the borrower's home.

Jorgenson, after getting the loan approved by the loan committee at Zions, of which he was one of the three members, would have a promissory note prepared for the borrower's signature and a check prepared for the amount of the loan. He then notified one of the co-conspirators at Manning that the loan had been approved and that the automobile dealer should arrange an appointment between the purchaser, himself, and one of

the co-conspirators at Manning. At the meeting, the purchasers were asked to fill out an F.H.A. form, "Credit Application for Property Improvement Loan." On the section of the form for listing the property to be improved, the purchasers were told to enter that the proceeds were to be used for an improvement to their home. Upon questioning this procedure, they were assured that nothing was wrong. After the form was completed, the purchaser would sign the promissory note, and the check drawn on the Zions account would be delivered to the purchaser. The purchaser then endorsed and delivered the check to the co-conspirator from Manning who, after deducting a commission, delivered the proceeds to the particular automobile dealer. Jorgenson would then take the credit application form and the promissory note back to Zions and place them in the loan file. In time, the loans were submitted to F.H.A. for approval and insurance.

Jorgenson first argues a restriction imposed by the trial court on defense counsels' cross-examination was reversible error either as an abuse of discretion or a denial of Sixth Amendment right of confrontation and assistance of counsel. The restriction was that counsel for the five co-defendants not be repetitive in their cross-examination so far as it could be avoided. The court later elaborated that defense counsel were not "to repeat what other defense counsel have cross-examined on, where it goes to exactly the same point."

The record reveals an exchange between the court and appellant's counsel concerning the characterization and limitation of the restriction. The court characterized it as an understanding among counsel and the court that the limitation extended to only same questions on cross-

examination. Appellant's attorney, however, felt this was a ruling by the court restricting cross-examination of the same area.

Clearly, the right of cross examination is fundamental in our judicial system.[1] Indeed, we have a long held "[a] full cross-examination of the witness upon subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom such witness is called, and denial is prejudicial error." Minner v. United States, 57 F.2d 560, 512 (10th Cir. 1932). The error of restrictive cross-examination arises in either or both of two contexts. The restriction may be such as to constitute a denial of the Sixth Amendment right of confrontation. Pointer v. Texas, 380 U.S. 400 (1965). A limitation of cross-examination, though deemed not prejudicial to the accused's rights, may still be determined to be an abuse of discretion by the trial court. Harries v. United States, 350 F.2d 231 (9th Cir. 1965).

Any reversal of the conviction on the basis of restrictive cross-examination must be based upon a showing of either or both a denial of a due process right of confrontation or an abuse of discretion by the trial court in limiting cross-examination. The claimed denial of the right of confrontation is premised in an assertion that Jorgenson's defense counsel was not permitted to ask the same questions as other defense attorneys had previously asked. The right of confrontation extends to *areas* of cross-examination. An area which is properly subject to cross-examination cannot be denied the accused. A limitation which prevents cross-examination into an area which is properly subject to cross-examination does con-

[1]Harries v. United States, 350 F.2d 231 (9th Cir. 1965).

stitute reversible error.[2] The characteristic feature in this situation is the complete denial of access to an area which is properly the subject of cross-examination; the *extent* of cross-examination is discretionary with the trial judge.[3] Smith v. Illinois, 390 U.S. 129 (1968). This distinction has been long recognized by this Court. In Arnold v. United States, 94 F.2d 499 (1938), we stated at 506:

> A reasonably full cross-examination of a witness upon the subjects of his examination in chief is the right, not the mere privilege, of the party against whom he is called, and as a rule, a denial of this right is a prejudicial error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary.

That exercise of discretion will not be upset unless it was clearly prejudicial. Whitlock v. United States, 429 F.2d 942 (10th Cir. 1970).

It is therefore incumbent on the appellant to show the limitation on cross-examination restricted either (1) his right of cross-examination by showing a denial of cross-examination on an area properly subject to cross-examination, or (2) a prejudicial limitation on the extent of cross-examination.

An examination of the record fails to reveal any restriction by the trial judge denying cross-examination in an area properly subject to cross-examination, and none is cited by the appellant. All areas of proper cross-examination were availablbe to the defendants. The re-

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[2] *See* Smith v. Illinois, 390 U.S. 129 (1968); Alford v. United States, 282 U.S. 687 (1931).

[3] Whitlock v. United States, 429 F.2d 942 (10th Cir. 1970).

striction imposed by the trial court was for the purpose of avoiding repetitious cross-examination, thereby alleviating the protracted length of the trial.

This Court dealt with a similar claim of restriction in Clonce v. United States, 356 F.2d 912 (10th Cir. 1966), *cert. denied* 384 U.S .992. In that case, defense counsel claimed he was restricted in his cross-examination of a government witness. We stated at 914 that, "'The court ruled out a repetitive question which the witness previously had answered clearly. In so doing the court acted within its discretion and its action did not prejudice the defendant.'[4] The limitation was neither an improper denial of appellant's cross-examination in a proper area, nor an abuse of discretion in limiting the extent of cross-examination.

Jorgenson next complains that his absence from certain conferences during the trial constitute mistrial in view of no voluntary waiver of his right to be present. He complains of seven such occasions at which he was not present. Four of these occurred on occasions after the jury was excused from the court's presence. Appellant would urge us to infer the removal of himself along with the jury. On the face of the record, we will not make such an inference. The record fails to disclose the appellant's absence at these times, and we will not infer such absence lacking positive proof to the contrary.

Another occasion was a bench conference between the court and a juror at which time the juror disclosed he perhaps knew one of the government's prospective

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[4] "The court may always exercise reasonable discretion in determining when a subject has been exhausted and whether continued cross-examination is merely repetition." United States v. Morabette, 119 F.2d 986, 98 (7th Cir. 1941).

witnesses. This conference was held out of the presence of the defendants and defense counsel. In subsequent discussions immediately afterward, however, the entire conversation was read by the reporter. There is no indication that appellant was not present at this time.

This Court has previously dealt with the rights of a defendant during exchanges between the trial judge and jurors. In Jones v. United States, 299 F.2d 661 (10th Cir. 1962), *cert. denied* 371 U.S. 864, *reh. denied* 371 U.S. 931, we stated at 662 that "we can let stand no conviction where the defendant was not present at all stages of the proceedings unless the record completely negatives any reasonable possibility of prejudice arising from such error." In that case, the trial judge had answered an inquiry of a juror out of the presence of the defendant. We conclude the inquiry related to a question of law, not fact, and was adequately covered by previously given instructions. We further concluded the appellant's presence would not have aided his defense, and that he suffered no prejudice.

In Bacino v. United States, 316 F.2d 11 (10th Cir. 1963), *cert. denied* 375 U.S. 831, we held it unnecessary to determine whether the trial court's private admonition to a juror was a part of the trial, thus requiring the appellant's presence, in view of a showing on the record that no prejudice or harm could have resulted. We can perceive no error in the private conversation between the juror and the trial judge. Any inherent prejudice was obviated by the court reporter's reading of the entire conversation to counsel and defendants. Ample opportunity was afforded for anyone who felt prejudiced thereby to object. There was evidently no prejudice

since appellant's counsel expressly stated he had no objection to the juror remaining on the panel.

The two remaining conferences of which Jorgenson complains were attended by appellant's counsel. Appellant was clearly not present at these conferences. The first of these conferences took place in a room designated as the lawyer's room. At this conference, the government attorney disclosed his remaining witnesses, as well as a witness not previously listed. A discussion was had on whether the jury should be questioned as to knowledge of these witnesses. In addition, other witnesses who were to be called were discussed as to special problems with each. At the second conference, the government attorney disclosed the result of his investigation of a wife of one of the witnesses who had been observed taking notes of previous testimony. The explanation was expressly accepted by appellant's attorney.

F.R.Crim.P. Rule 43 requires that the defendant be present "at every stage of the trial. . . ." We held in Ellis v. Oklahoma, 430 F.2d 1352, 1355 (10th Cir. 1970), *cert denied* ..... U.S. ..... (197..), that "a criminal defendant does not have an absolute constitutional right to be a participant in such *in camera* discussions where his lawyer is present. . . ." We further held "the question narrows itself to whether the communication itself, as related in the *in camera* proceeding, was actually prejudicial." Our review of the record fails to reveal any prejudice to appellant's cause being occasioned by his absence. We find no reversible error in his absence. Jones v. United States, *supra*.

Jorgenson next argues error by the trial court in denying his motion for judgment of acquittal under

F.R.Crim.P. Rule 29. He contends the government failed to produce sufficient evidence to sustain a conviction on either the fraud charges or the conspiracy charge. We stated in United States v. Harris, 441 F.2d 1333, 1336-37 (10th Cir. 1971), that:

> In deciding a motion for acquittal the trial judge determines whether, considering the evidence in the light most favorable to the government, there is substantial evidence from which a jury might reasonably find that an accused is guilty beyond a reasonable doubt.

Our review of the record at the close of the government's case in chief, at which time the motion was made, disclosed direct testimony of six borrowers implicating Jorgenson in the fraudulent scheme. They were able to identify Jorgenson as one of the men present when the false statement of the purpose for the loan was represented to be proper. Two testified it was Jorgenson who made the representation. In addition, Millard, the defendant against whom the charges were dismissed who testified for the government, testified to Jorgenson's presence at numerous other loan closings. On the basis of this record, we cannot conclude that the trial judge committed error in the application of Rule 29.

Appellant next asserts he was improperly joined with the co-defendants alleging two alternative grounds if misjoinder. He first asserts improper joinder under F.R.Crim.P. Rule 8, contending that neither the defendants nor charges were inter-connected by the same transaction or series of transactions. We dealt with the question of joinder of offenses and defendants in United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969). Jonnder of offenses is proper under F.R.Crim.P. Rule

8(a) if the offenses are of the same character. Defendants may be joined under Rule 8(b) if they were co-participants in the same act or transaction or series of acts or transactions. Joinder of the multiple defendants in this case is proper only if there is proof of their joint participation in the same act or transaction or series of acts or transactions. If this proof is lacking, there is no room for the exercise of judicial discretion and the court must grant severance.[5] Our review of the record in connection with appellant's previous argument disclosed ample evidence to conclude there was a conspiracy of which Jorgenson was a participant.

There was one conspiracy resulting in numerous fraudulent loan applications. Each loan did not constitute a separate conspiracy as appellant argues. The conspiracy charge here extended only to the officers and employees of Manning and to Jorgenson. All the co-conspirators were very familiar with the *modus operandi* of the fraudulent scheme undertaken in each loan. The presence of all the co-conspirators at each loan closing is not a necessity for a showing of conspiracy among all the conspirators.[6]

This case is not controlled by Kotteakos v. United States, 328 U.S. 750 (1946), as urged by appellant. In that case, the borrowers were joined as defendants in a conspiracy charge in which the individual broker was the only individual common to the at least eight separate and independent groups of conspirators. The pattern analogized by the government was "that of separate spokes

[5]United States v. Eagleston, 417 F.2d 11 (10th Cir. 1969).

[6]"[T]here is no requirement that every defendant must participate in every transaction in order to have a single conspiracy as long as the participate in a common plan or series of transactions." United States v. Hutul, 416 F.2d 607, 619 (7th Cir. 1969), *cert. denied* 396 U.S. 1012, *reh. denied* 397 U.S. 1081.

meeting at a common center." As such, the individuals of the separate groups, having no direct interconnection with the other groups, were not in the status of co-conspirators.

We feel the evidence in this case clearly discloses the indictment included only members of the "hub" or the central group. All within this group are co-conspirators. The government's proof did not show multiple conspiracies as in Kotteakos; therefore it is clearly inapplcable. The proof of one conspiracy of which Jorgenson was a co-participant satisfies the requisite for joinder of defendants under F.R.Crim.P. Rule 8(b).

Jorgenson next argues improper joinder under F.R.Crim.P. Rule 14 caliming an abuse of discretion by the trial court which had a prejudicial effect toward him. He first argues prejudicial joinder on the basis of size and complexity of the trial. He again cites Kotteakos v. United States in support of this argument, asserting the similarities of Kotteakos make it applicable to this case. In Kotteakos, there were eight separate conspiracies proved involving 32 defendants at he outset. The Court, in reversing, stated, "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." Kotteakos v. United States, *supra*, at 774. The Court expressly did not overrule Berger v. United States, 295 U.S. 78 (1935), in which one conspiracy was charged against eight persons. The government's proof in Berger disclosed two conspiracies involving four of the defendants with only one conspirator common to each. The Court, though reversing on other

grounds, held the variance in proof did not affect Berger's substantial rights, hence was not fatal to the conviction.

We fail to perceive the high degree of similitude with Kotteakos urged by appellant. In Kotteakos, in basing the distinction between the two cases on the sheer difference in numbers of defendants and conspiracies proven, the Court stated, "Whether or not Berger marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case [Berger] and this one." Kotteakos v. United States, *supra*, at 774.

This case discloses a single conspiracy charged initially against eight co-defendants. After dismissing as to two defendants, Millard and Investment Brokers, Inc., trial to the jury of the remaining six defendants was commenced. The ultimate proof at trial resulted in guilty verdicts against five of the six for a single conspiracy. The jury verdict as to Mitchell was later set aside by the court as Mitchell had previously waived trial by jury, the jury verdict being only advisory to the court.

The burden of showing prejudice under F.R.Crim. P. Rule 14 is on the defendant moving for severance.[7] The trial court concluded there was insufficient showing of prejudice to warrant the severance. Our review discloses a basis for this determination. The granting of motions for severance under F.R.Crim.P. Rule 14 is within the discretion of the trial court, and it is error only when that discretion has been abused.[8]

Affirmed.

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[7]United States v. Harris, 441 F.2d 1333 (10th Cir. 1971).

[8]United States v. Kellerman, 432 F.2d 371 (10th Cir. 1970); United States v. Rogers, 419 F.2d 1315 (10th Cir. 1969).

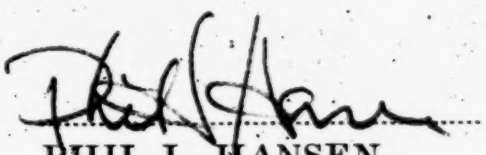
PROOF OF SERVICE

I, Phil L. Hansen, attorney for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 15 day of December, 1971 I served copies of the foregoing Petition for Writ of Certiorari as follows:

1. By mailing 40 copies to the Clerk of the Supreme Court of the United States in a duly addressed envelope, air mail postage prepaid, Washington, D.C.

2. By mailing a copy in a duly addressed envelope with air mail postage, prepaid to the Solicitor General Department of Justice, Washington 25, D.C.

(3) By mailing a copy to C. Nelson Day, United States District Attorney, postage prepaid, U. S. Post Office Building, Salt Lake City, Utah.



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